STATE OF MICHIGAN

IN THE SUPREME COURT

B.
DONNA DECOSTA,

Plaintiff-Appellant,

v.

DAVID D. GOSSAGE, D.O., and
~~THE~~ GOSSAGE EYE CENTER,

Defendants-Appellees.

Supreme Court File No.
Opn 9-2-08

Court of Appeals File No. 278665

Trial Court File No. 06 – 747 NM
Hillsdale
M. Smith

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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

(Oral Argument Requested)

TABLE OF CONTENTS

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellant (referred to throughout as "Plaintiff") seeks leave to appeal the Court of Appeals' September 2, 2008 opinion and order affirming the trial court's May 30, 2007 order granting Defendants-Appellees' (referred to through as "Defendants") motion for summary disposition.

This Court has jurisdiction to consider this appeal pursuant to MCR 7.301.

Plaintiff seeks peremptory reversal of the Court of Appeals' September 2, 2008 opinion and order. In the alternative, Plaintiff respectfully asks this Court to grant leave to appeal.

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INDEX OF AUTHORITIES

Case Law

Court Rules & Statutes

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STATEMENT OF QUESTION PRESENTED

I. Is summary disposition appropriate in this medical malpractice case where each Defendant – Dr. Gossage and his practice – had actual and timely notice of Plaintiff's Notice of Intent under MCR 600.2912b?

Plaintiff-Appellant says: No.
Defendant-Appellees say: Yes.
The trial court said: Yes.

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STATEMENT OF FACTS

This is a medical malpractice case arising out of the treatment of Plaintiff Donna DeCosta by David D. Gossage, D.O., and his practice, the Gossage Eye Institute. (Complaint, ¶ 5.)

Around the summer of 2002, Mrs. DeCosta began experiencing what she perceived as lightning flashes in her right eye, for which she sought treatment from Dr. Gossage in Hillsdale, Michigan. (Complaint, ¶ 6.) Dr. Gossage indicated that Mrs. DeCosta had, "Cataracts OU" in both eyes. (Complaint, ¶ 7.) Mrs. DeCosta had several subsequent visits with Dr. Gossage. (Complaint, ¶ 8.) During some or all of those visits in pre-June 2004, Mrs. DeCosta repeatedly assured Dr. Gossage that she merely needed an updated prescription because her glasses were seven years old. (Complaint, ¶ 9.) However, Dr. Gossage told Mrs. DeCosta that without correction of cataracts her vision would not get better. (Complaint, ¶ 10.)

Mrs. DeCosta visited another ophthalmologist, who had evaluated her before, on April 11, 2003, Dr. McGetrick. On that date, he evaluated her corrected vision to be 20/25 in the right eye and 20/30 in the left eye. (Complaint, ¶ 11.) Mrs. DeCosta did not complain of any cataract related problems and there had been no significant progression in her cataract at that time. (Complaint, ¶ 12.) Dr. McGetrick does not even recall discussing the cataracts with Mrs. DeCosta because it was unnecessary. (Complaint, ¶ 13.)

Mrs. DeCosta visited Dr. Gossage again in 2004 where he measured her vision to be 20/20 and 20/25, a slight impairment that certainly would not justify cataract surgery. (Complaint, ¶ 14.) However, Dr. Gossage performed cataract surgery on Mrs. DeCosta's left eye on June 3, 2004 at Hillsdale Community Hospital. (Complaint, ¶ 15.)

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The hospital staff at Hillsdale Community Hospital prepped Mrs. DeCosta for surgery in a non-sterile environment: the hallway of the hospital. (Complaint, ¶ 16.) The surgery was performed in "the closet," as nicknamed by Hillsdale Community Hospital employees. (Complaint, ¶ 17.)

An intra-operative complication arose that increased Mrs. DeCosta's risks of developing infection. (Complaint, ¶ 18.) Mrs. DeCosta was not immediately told about this complication. (Complaint, ¶ 19.) Had she been told of the problem, she would have been more prepared for other potential problems and she would have insisted on involving other specialists. (Complaint, ¶ 20.)

Two hours after surgery, Mrs. DeCosta noted a cloudy peripheral vision in her left eye which worsened over the next few hours until Mrs. DeCosta could not see at all out of that eye. (Complaint, ¶ 21.) She telephoned Dr. Gossage to inform him of the problem and he told her that because there was no pain he did not feel the problem was serious. (Complaint, ¶ 22.)

Mrs. DeCosta visited Dr. Gossage the next morning, for a previously scheduled appointment, with a headache. (Complaint, ¶ 23.) After she reported her headache to Dr. Gossage, he treated her with eye drops, which offered no significant alleviation of symptoms. (Complaint, ¶ 24.) She remained in his office for a total of three hours, receiving eye drops and having needle extractions of fluid taken from her eye to relieve increased pressure. (Complaint, ¶ 25.)

The next morning Mrs. DeCosta awoke with a greater headache combined with nausea. (Complaint, ¶ 26.) Her son immediately took her to see Dr. Gossage at approximately 10:00 am

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on June 5, 2004. (Complaint, ¶ 27.) Dr. Gossage administered more eye drops to Mrs. DeCosta and sent her to a retinal specialist, Daniel F. Marcus, M.D., in Toledo. (Complaint, ¶ 28.)

Dr. Marcus examined Mrs. DeCosta and sent her to Toledo Hospital where a vitrectomy, an anterior chamber tap and a vitreous injection for endophthalmitis were performed. (Complaint, ¶ 29.) Dr. Marcus prescribed five different medications for Mrs. DeCosta. (Complaint, ¶ 30.) On Sunday, June 6, 2004 Mrs. DeCosta again visited Dr. Gossage, where she learned that the post-operative lab results indicate she was suffering from a coagulase negative staphylococcal infection. (Complaint, ¶ 31.)

Mrs. DeCosta's right eye now shows no significant cataract. (Complaint, ¶ 32.) Mrs. DeCosta continues to suffer from extreme vision problems. (Complaint, ¶ 33.)

David D. Gossage breached the standard of care in the following ways:

a. He failed to accurately evaluate and diagnose Mrs. DeCosta's eyes.

b. He concluded she had cataracts that medically indicated cataract surgery when there was insufficient evidence to justify surgery.

c. He did not explain to Mrs. DeCosta the accurate evaluation and diagnosis of her eyes.

d. He did not discuss alternatives to surgery with Mrs. DeCosta, therefore he did not obtain her informed consent.

e. He performed the June 3, 2004 surgery which was not medically necessary.

f. He failed to ensure that his operating room was safe, clean and sterile, resulting in the staph infection that plagued Mrs. DeCosta.

g. He did not promptly inform Mrs. DeCosta of the complication during her surgery.

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h. He disregarded her complaint on June 3, 2004 of pain in the left eye and insisted she wait until her scheduled appointment the next morning to see him.

i. He did not obtain a retinal consultation after having Mrs. DeCosta endure hours of eye drops and fluid extraction while receiving little relief. (Complaint, ¶ 35.)

Damages suffered by Mrs. DeCosta include the following:

a. Objects in her left eye appear as globs without definition, a problem she has termed the, "lava lamp" effect.

b. Distortion effects in her left eye.

c. Inability to drive because she is uncomfortable being at an increased risk of accident due to diminished vision that was a result of the surgery performed by Dr. Gossage.

d. A tremendous amount of stress, anxiety and worry as a result of the extreme loss of vision in her left eye.

e. Constant everyday limitations due to poor vision in the left eye.

f. Increased strain on the right eye to compensate for the diminished vision in the left.

g. Daily headaches interfering with her normal routine.

h. Over $30,000.00 in medical treatment costs incurred as a result of the defendants' violations of the standard of care. (Complaint, ¶ 36.)

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ANALYSIS

I. Standard of Review.

Defendants sought summary disposition pursuant to MCR 2.116(C)(1), (3), (7), (8) and (10). Under (C)(10), Defendant is entitled to summary disposition if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment" as a matter of law. Given the purpose of this motion is to test factual support for a claim, a Court

> "**considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties . . . in a light most favorable to the party opposing the motion.** A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of material fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999) (quoting *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996) (citations omitted; emphasis added)).

In addition, MCR 2.116(G)(6) requires that affidavits, admissions, depositions, or other documentary evidence offered in opposition to a motion for summary disposition under subsections (C)(7) or (10) shall be considered to the extent that the content or substance would be admissible as evidence. Also see *Maiden v Rozwood*, 461 Mich 109, 119, 121; 597 NW2d 817 (1999), which held that the substance or content of the supporting proofs must be admissible in

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evidence and the reviewing court should evaluate a motion under subsections (C)(7) and (10) by considering the substantively admissible evidence.

The trial court is not permitted to make factual findings or weigh credibility in ruling on such a motion. *Manning v Hazel Park*, 202 Mich App 686, 689; 509 NW2d 874 (1993).

Finally, "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)." MCR 2.116(G)(5).

II. Argument.

SUMMARY DISPOSITION IS INAPPROPRIATE BECAUSE DEFENDANTS EACH HAD TIMELY AND ACTUAL NOTICE OF PLAINTIFF'S NOTICE OF INTENT.

It cannot be emphasized too strongly that it is undisputed that Plaintiff's Notice of Intent was timely and that each Defendant had actual notice of the claim.

Michigan Compiled Laws section 600.2912b requires Plaintiff to file a statutorily-compliant Notice of Intent before filing the Complaint and Affidavit of Merit. MCL 600.2912b. The subsection of that statute most pertinent to this appeal is section 2912b(2), which provides that:

> "The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. **Proof of the mailing constitutes prima facie evidence of compliance with this section.** If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered." *Id.* (emphasis added.)

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Here, Plaintiff was required to mail her Notice of Intent not later than June 3, 2004, because that was the first act or omission of malpractice giving rise to Plaintiff's Complaint. (Complaint, ¶ 15.) Therefore, Plaintiff had until June 3, 2006 to mail her Notice of Intent and thus toll the statute of limitations for 182 days.[1] Plaintiff in fact did timely mail that Notice of Intent on June 1, 2006, two days before the expiration of the statute of limitations.

As indicated above, section 2912b requires that the Plaintiff mail her Notice of Intent "to the last known business or residential address of the health professional or health facility who is the subject of the claim." MCL 600.2912b(2). Here, Plaintiff's Notice of Intent with respect to Dr. Gossage and the Gossage Eye Institute was addressed as follows:

> David D. Gossage, D.O., F.A.O.C.O.
> Gossage Eye Institute
> 46 South Howell
> Hillsdale, MI 49242
>
> Gossage Eye Institute
> 46 South Howell
> Hillsdale, MI 49242

Defendants admit that "Prior to October of 2003, plaintiff was seen at Dr. Gossage's office located at 46 S. Howell Street, Hillsdale, Michigan, 49242" and that he conducted business there until 2004.[2] In fact, an October 6, 2004 letter from Dr. Marcus at Retina Consultants of Northwest Ohio regarding Mrs. DeCosta was mailed to Dr. Gossage at that same address: 46 South Howell in Hillsdale. Defendants now claim, however, that Dr. Gossage did not receive timely notice of the

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1 154 days under some other circumstances, none of which apply here.

2 Defendant's Brief in Support of Motion for Summary Disposition, at 3.

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Notice of Intent until after the statute of limitations had expired because he had a new business address.

Summary disposition is inappropriate because Plaintiff strictly complied with the requirements of the Medical Malpractice Act, including as cited above. Plaintiff mailed the Notice of Intent to Dr. Gossage's last known business address. **Merely because he continued to practice in some other, additional location does not mean that Plaintiff mailed the Notice of Intent to the wrong address. Plaintiff still believed that he was practicing at that location and receiving mail there, as well. Indeed, Plaintiff relied on the medical records themselves in deciding to mail the Notice of Intent to the same address which Dr. Gossage admits doing business at. Furthermore, if that was not a correct address to which to send materials, how does Defendant explain the fact that the Notice of Intent was delivered and signed for on his behalf at that same address?**

In addition, note that the Medical Malpractice Act does not require that each respondent have been served (as in physically received) the Notice of Intent prior to the expiration of the statute of limitations, only that Plaintiff mail it by that time. The Act requires that the Notice of Intent "shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of this claim." MCL 600.2912b(2); emphasis added.

In addition, Plaintiff has documentary proof that Defendants received the Notice of Intent and that it was timely mailed, per the statute.

First, Defendant Gossage treated Mrs. DeCosta at the 46 South Howell Street address, a fact Defendants concede. (Defendants' Brief in Support of Motion for Summary Disposition, at

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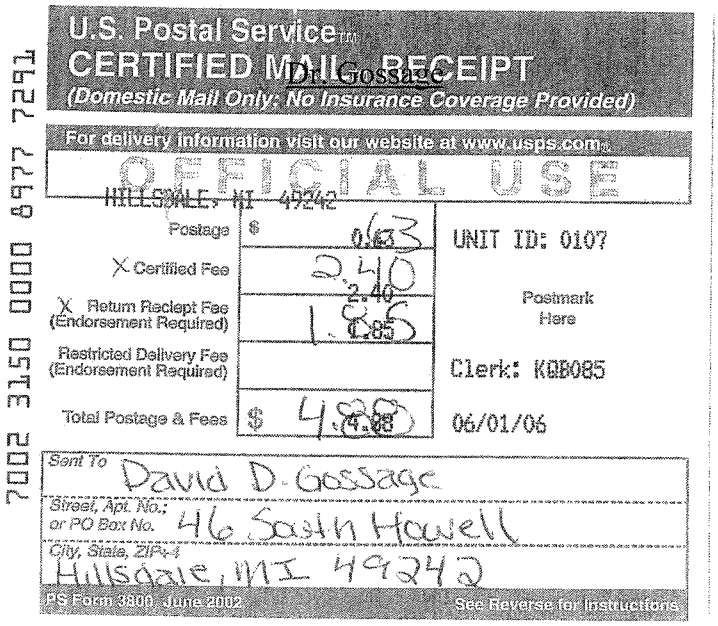
3.) In fact, Dr. Gossage's own letterhead reflects that he did business at that address, including during his treatment of Mrs. DeCosta. That letterhead is attached as ***Exhibit 1***. Also included in that exhibit are letters from other doctors to Dr. Gossage at that same address.

Second, current materials available online indicate that Dr. Gossage still maintains a practice at 46 South Howell Street in Hillsdale. Those materials are attached as ***Exhibit 2***.

Third, and perhaps even more significantly, **the Notice of Intent which Plaintiff mailed to Dr. Gossage at the 46 South Howell Street address was delivered and signed for!** A copy of the United States Post Office proof of delivery (green return receipt card) and proof of mailing is attached as ***Exhibit 3***. Specifically, two proofs of mailing are attached and are also depicted below:


U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
Dr. Gossage
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE
HILLSDALE, MI 49242
Postage $ 0.63
Certified Fee 2.40
Return Receipt Fee (Endorsement Required) 1.85
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $ 4.88
UNIT ID: 0107
Postmark Here
Clerk: KQB085
06/01/06
7002 3150 0000 8977 7291
Sent To David D. Gossage
Street, Apt. No.; or PO Box No. 46 South Howell
City, State, ZIP+4 Hillsdale, MI 49242
PS Form 3800, June 2002
See Reverse for Instructions

The certified mailing receipt proving a mailing date of June 1, 2006.

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ATTORNEYS AT LAW
SOUTH MAIN STREET
NN ARBOR, MI 48104
(734) 747-7055

T

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits. DeCosta

1. Article Addressed to:
David D. Gossage attn
Gossage Eye Institute
46 South Howell
Hillsdale, MI 49242

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) | C. Date of Delivery 6/5

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7002 3150 0000 8977 7291

PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-1540

The green return receipt card proving that the June 1, 2006 Notice of Intent was accepted and signed for on behalf of Dr. Gossage. The acceptance signature is located in the upper-right hand corner of the card.

UNITED STATES POSTAL SERVICE

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Blaske & Blaske, P.L.C.
500 South Main
Ann Arbor, MI 48104

RECEIVED
JUN - 6 2006
By

C001

The back of the green return receipt card, showing Plaintiff's counsel's mailing address to which the card was returned after being signed by Dr. Gossage's representative.

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Under the statute, "Proof of the mailing constitutes *prima facie* evidence of compliance with this section." We have proof of the mailing, above. Indeed, Dr. Gossage admits in his Affidavit, filed as Exhibit B to Defendants' Motion for Summary Disposition, that "On June 6, 2006, Affiant received copies of a letter [the Notice of Intent] dated June 1, 2006 . . ." (Affidavit of Dr. David R. Gossage, at ¶ 9.) How could he possibly now argue, in good faith, that he did not receive a timely-mailed Notice of Intent? Clearly he cannot, especially given the statute's crystal-clear language that proof of mailing constitutes *prima facie* evidence of compliance with the statute.

All of these facts indicate that Plaintiff complied with the statutory requirements.

Gossage Eye Institute

The certified mailing receipt proving a mailing date of June 1, 2006.

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IO SOUTH MAIN STREET
NN ARBOR, MI 48104
(734) 747-7055

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

DeCosta
Gossage Eye Institute
46 South Howell
Hillsdale, MI 49242

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) | C. Date of Delivery 6/5

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7002 3150 0000 8977 7307

PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-1540

The green return receipt card proving that the June 1, 2006 Notice of Intent was accepted and signed for on behalf of the Gossage Eye Institute..

The acceptance signature is located in the upper-right hand corner of the card.

Notice that the article number matches exactly with the one on the certified mailing receipt, above.

UNITED STATES POSTAL SERVICE

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Blaske & Blaske, P.L.C.
500 South Main
Ann Arbor, MI 48104

RECEIVED
JUN - 6 2006
By

C001

The back of the green return receipt card, showing Plaintiff's counsel's mailing address to which the card was returned after being signed by the same Gossage Eye Institute's representative who signed for the Notice of Intent directed to Dr. Gossage.

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Next, summary disposition as to Defendants' request to dismiss the entity Defendant – the Gossage Eye Institute – was inappropriate because Dr. Gossage's own letterhead, which he signed, creates a fact issue as to whether he was an employee and/or agent of that entity. That letterhead is included in ***Exhibit 1***.

Defendants undisputedly each had actual notice of Plaintiff's timely-mailed Notice of Intent. The documentary proof is attached. **Dr. Gossage admits in his affidavit that he received the June 1, 2006 Notice of Intent.** Merely because he received mail in some branch office other than the one to which Plaintiff mailed the Notice of Intent is irrelevant. After all, what is to prevent Defendants from opening multiple branches or offices or receive mail at different locations and then accuse Plaintiff, as they are doing here, of not having mailed the Notice of Intent to the correct one, when in fact Plaintiff mailed the document to the address indicated on Defendant's own letterhead and the address at which Defendant signed for the documents? Therefore, summary disposition was inappropriate because at the very least, all of this evidence, which the trial court should have viewed in a light most favorable to Plaintiff (the non-moving party), created a genuine issue of material fact.

As Judge Jansen noted in her dissenting opinion in this case, there is "no evidence to suggest that plaintiff was aware that [Dr. Gossage's] new address was [his] sole or exclusive address."[3] The reason there is no evidence is because none exists. Plaintiff did not know, nor could she have known, that the new address was the sole address. As Judge Jansen observed,

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[3] Dissenting opinion, at 2.

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> **"it is eminently reasonable to conclude that plaintiff honestly believed that defendants simultaneously maintained two addresses – the previous address and the new address – both of which were "known" to plaintiff. Despite the fact that plaintiff had seen defendants at the new address, I cannot conclude on the facts of this case that plaintiff did not send her initial notice of intent to defendants' 'last known . . . address.'**
>
> Furthermore, I find the facts of this case distinguishable from the facts of *Fournier, supra*. In *Fournier*, the plaintiff enclosed the notices of intent for all six of the named defendants in one envelope and inadvertently sent that envelope to the residential address of an uninvolved, non-party physician. *Fournier, supra* at 463. None of the named defendants shared the non-party physician's address. *Id.* at 463-464. **In contrast, plaintiff in the instant case did not send her initial notice of intent to an unrelated address, but rather sent it to a valid, known address where she had previously sought treatment from defendants.** Because the facts of this case are distinguishable from those of *Fournier*, I conclude that *Fournier* should not control the outcome of the present appeal.
>
> **Lastly, I cannot omit mention of the fact that defendants actually received plaintiff's initial notice of intent**, which was forwarded from defendants' previous address to their new address. MCL 600.2301 directs that "[t]he court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." In light of the fact that defendants actually received plaintiff's initial notice of intent, I must conclude that plaintiff's act of mailing the notice to defendants' previous address "d[id] not affect the substantial rights of the parties." MCL 600.2301. Because they actually received the forwarded notice of intent, defendants were not prejudiced by the fact that plaintiff happened to send the notice to their previous address. I would reverse and remand for reinstatement of plaintiff's complaint." *Id.*; emphasis added.

For these reasons, too, Plaintiff asks the Court to grant the instant application.

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CONCLUSION AND RELIEF REQUESTED

Plaintiff respectfully asks the Court to peremptorily reverse the Court of Appeals' September 2, 2008 opinion and order and remand this case for further proceedings. In the alternative, Plaintiff asks the Court to grant the instant application for leave to appeal.

Dated: October 13, 2008

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